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EX PARTE OR LATE FILED

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20544

Re: Ex Parte Presentation in CS Dkt. No. 95-184

Dear Mr. Caton:

I represent RCN Cable (formerly known as Liberty Cable) in this proceeding. I am submitting an original and three copies of this notice of *ex parte* presentations by RCN.

On July 7, 1997, I met with the following individuals from the Cable Services Bureau to discuss inside wiring issues: Merideth Jones, Chief; John Logan, Acting Deputy Chief; JoAnn Lucanik, Chief of Policy and Rules Division; Rick Chesen, Deputy Chief of Policy and Rules Division and Lynn M. Crakes, Attorney-Advisor. On July 8, 1997, I spoke on the telephone with John Logan and Suzanne Toller, Legal Advisor to Commissioner Chong.

We discussed the proposal of the Independent Cable and Telecommunications Association as applied to MDU buildings in "mandatory access" states such as New York and Massachusetts. RCN expressed its concern that under the proposal, the incumbent cable operator might claim the right under the access law to fully occupy the space inside conduits and molding with unused cable or other equipment between the current demarcation point and the incumbent's junction box thereby effectively precluding access to and the use of cable home wiring (the "Blocked Conduits"). The Commission has preemptive jurisdiction over Blocked Conduits to the extent the blockage interferes with the introduction of competing MVPD service. See *New York State Comm'n on Cable Television v. F.C.C.*, 749 F.2d 804 (D.C. Cir. 1984) and *New York State Comm'n on Cable Television v. F.C.C.*, 669 F.2d 58 (1982)¹. The Commission can and should exercise that jurisdiction to ensure that there will be no Blocked Conduits. Furthermore, the

¹ That preemptive jurisdiction was left untouched when Congress adopted the 1984 Cable Act. See 47 U.S.C. §541(e) and House Report No. 98-934 at p.63, 1984 U.S. Code Cong. and Adm. News 4655 at p.4700 ("The Committee does not intend anything in this title to affect the FCC's decision [in *Earth Satellite Communications, Inc.*], or to affect any review of this decision by the courts.

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Commission can and should declare that leaving unused cable or other equipment in any conduit, molding or other similar location that prevents access to the demarcation point or otherwise interfering with access to or the use of cable home wiring is contrary to the public interest and does not serve a public purpose.

RCN also restated its position that the Commission has the jurisdiction to move the demarcation point in MDU buildings to the point where the individual dedicated subscriber line meets the common line, regardless of where in the building that point occurs. The demarcation point is currently set in the common areas of an MDU building at or about 12" outside the individual dwelling unit. This is an arbitrary point that, in many cases, renders the cable home wiring inaccessible and unusable to competitors.

The statute authorizing the Commission to regulate the individual subscriber lines is silent on where the demarcation point should be in an MDU building and the legislative history is, at best, ambiguous on this point.² The courts will defer to the Commission's rational construction of a statute it has been authorized to administer absent a "compelling legislative history" supporting an alternative construction. *Strickland v. Secretary, U.S. Dept. of Agriculture*, 48 F.3d 12, 16-18 (1st Cir.), cert. den., 116 S.Ct. 145 (1995). See also, *Northwest Forest Resource v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) ("When the statute's language can be construed in a consistent workable fashion, this Court must put aside contrary legislative history." [internal quotations and citations omitted.]); *U.S. v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993), cert. den., 114 S.Ct. 2746 (1993) ("A committee report does not have the force of law.")

The Commission has already construed the statute as applying to individual dedicated subscriber lines. And the Commission has already construed the statute to place the demarcation point in the common areas of an MDU building. RCN and other competitive

² 47 U.S.C. §544(i) requires the Commission to "prescribe rules concerning the disposition . . . of any cable . . . within the premises of such subscriber." The statute clearly contemplates jurisdiction over individual subscriber lines but is silent on the location of the demarcation point for those lines. The statute is also silent on whether and to what extent the demarcation point can be in the common areas of an MDU building. The Senate Report says the Commission's inside wiring rules for telephone are "a good policy and should be applied to cable." Senate Report No. 102-92 at p. 23. The telephone inside wiring rules in effect in 1992 and today set the demarcation points throughout the common areas of an MDU building, typically at the "minimum point of entry." They also define "premises" as "a dwelling unit, other building or legal unit or real property" — a definition that includes an entire MDU building. 47 C.F.R. §68.3. The House Report said "this section is not intended to cover common wiring within the [MDU] building, but only the wiring within the dwelling unit of individual subscribers." The House Report is silent on the location of the demarcation point and where in the MDU building it should be.

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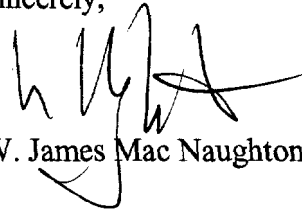
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MVPD's are simply asking the Commission to construe the statutory words "any cable" to include all of the individual subscriber line that serves an individual MDU dwelling unit, even if the demarcation point is moved to another common area of the MDU building.

The record developed thus far in this proceeding shows — without question — that the demarcation point for individual subscriber lines needs to be moved to include all of the line outside the subscriber's dwelling unit, not just 12" of it, to foster competition in MDU's. There is nothing in the legislative history that "compels" limiting the demarcation point to 12" outside the individual dwelling unit. It is a rational and permissible (and therefore judicially sustainable) construction of "any cable" to mean the individual dedicated subscriber line in its entirety.

Sincerely,



W. James Mac Naughton

WJM:lw

cc: Merideth Jones
John Logan
JoAnn Lucanik
Rick Chesen
Lynn M. Crakes
Scott Burnside
John Filipowicz
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William Burhop
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